

DATE: January 12, 1995

CASE NO.: 94-STA-0016

IN THE MATTER OF:

KENNETH C. CLIFTON,  
Complainant

v.

UNITED PARCEL SERVICE,  
Respondent.

APPEARANCES:

Mary A. Parker, Esquire  
Jeannie Joe, Esquire  
For the Complainant

Charles Hampton White, Esquire  
For the Respondent

BEFORE: PAUL H. TEITLER  
Administrative Law Judge

#### **RECOMMENDED DECISION AND ORDER**

This action arises under the Surface Transportation Assistance Act of 1982 (the Act), 49 U.S.C. §2305, and the regulations promulgated thereunder, 29 C.F.R. §1978. Section 405 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules. This legislation is designed to promote safety on the highways by protecting employees from discriminatory action due to an employee's engagement in protected activity.

#### **ISSUES**

- (1) Whether the Complainant filed a timely complaint with the United States Department of Labor.
- (2) Whether the Complainant is a protected person under Section 405.
- (3) Whether the Complainant engaged in protected activity.
- (4) Whether the Complainant was subject to adverse action by the Respondent.
- (5) Whether the Respondent was aware of the Complainant's protected activity.



(6) Whether there is a causal link between the Complainant's protected activity and the adverse action of the Respondent.

### **Procedural History**

In January 1990, Kenneth C. Clifton, the Complainant, filed a telephone complaint with Tennessee Occupational Safety and Health Administration (TOSHA). He spoke with Steve Hawkins (Hawkins), a compliance officer. He later filed a complaint at the TOSHA office. Hawkins subsequently conducted an inspection of the United Parcel Service (UPS) site at White's Creek.

The Complainant was discharged on April 24, 1990 for just cause, sexual harassment. EX<sup>1</sup> 15. After receiving the discharge notice, the Complainant filed a grievance with the International Brotherhood of Teamsters Local Union 480 (Union or Teamsters) and contacted TOSHA asserting that the discharge was in retaliation for his filing the TOSHA complaint. TR at 38. The Panel upheld his grievance and he was reinstated.

The Complainant was discharged again on August 27, 1990 for reckless endangerment. EX 19. He again filed a grievance with the Teamsters. The grievance was again upheld and the Complainant was reinstated.

The Complainant was discharged a final time on March 18, 1991 for an act of dishonesty. EX 25. He filed a grievance. The grievance was denied at the local hearing and at the panel. The Complainant then contacted TOSHA and told Mr. Robert Bradford Cooper (Cooper) that his grievance had been denied. Cooper assured him that TOSHA would investigate. TR at 133. He received a letter from Commissioner White, Tennessee Department of Labor, informing him that TOSHA conducted an investigation and found his claim without merit. He then contacted the United States Department of Labor, Occupational Safety and Health Administration (OSHA) by letter dated August 30, 1991 and requested them to investigate his discharge. TR at 137.

### **Testimony of Kenneth C. Clifton**

The Complainant, Kenneth Clayton Clifton, testified on September 21, 1994 in Nashville, Tennessee. He began working with UPS in June 1978 and was last discharged on March 18, 1991. TR at

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<sup>1</sup> The following references are used herein: "CX" designates the Complainant's Exhibits; "EX" designates the Employer's Exhibits; "JX" designates Joint Exhibits; "TR" designates the pages of the transcript of the hearing conducted on September 21-22, 1994 in Nashville, Tennessee.

21, EX 25. He always worked part-time, about thirty-five hours per week with two part-time job classifications. TR at 22. At the time of his final discharge, he was working as a shifter and an air driver. A shifter drives the tractors away from the dock after the trailer has been loaded or unloaded. An air driver delivers the overnight air packages.

He testified that he was discharged in 1981 because he failed to double check packages to avoid missorts. He denied having any other disciplinary problems until 1990. TR at 23.

In late January of 1989, Clay Harrell (Harrell), the Complainant's immediate supervisor, told the Complainant about a new procedure in which the shifter no longer checked the trailers. TR at 24. The new procedure required the supervisor to check the trailer and radio to the shifter when it was safe to depart. He explained that prior to the change in the switching procedure, the shifters were responsible for checking and ensuring that no one was in the trailer before they drove the trailer away from the dock. TR at 23-24.

The Complainant testified that he saw the potential for danger with the new procedure and discussed this with Bill Shadelow (Shadelow), warehouse supervisor. TR at 25. When the Complainant did not hear back from Shadelow, he demonstrated to Harrell how an individual could be injured. Harrell recommended banging on the nose of the trailer. TR at 26. The Complainant felt this was not adequate because an individual in the trailer may not hear the banging over the other noises.

The Complainant testified that he reported the alleged safety violations to TOSHA in January 1990, only after he had spoken to four managers to no avail. He told his co-workers and his supervisors, Joe Carlton, Harrell, and Keith Gill (Gill), "well, I believe I'll have to go to OSHA to file a complaint to have this stopped." TR at 27. In filing the complaint, he phoned TOSHA and spoke with Hawkins. He then went uptown and filed the complaint. Upon inspecting the UPS site at White's Creek, Hawkins issued a citation and fined UPS three hundred dollars for the safety violations. TR at 29; CX 7.

The Complainant testified that in March 1990 he tried to make a switch by visually checking the trailer before pulling away from the dock. He stated that Carlton told him that he would be discharged if he got out of his yardbird.

On April 2, 1990, the Complainant phoned Liberty Mutual Insurance, the insurance company responsible for paying claims of those injured on the job. He spoke with Jan Gatlin (Gatlin) and told her of the alleged safety violations and that UPS had not rectified the problem. TR at 31. Gatlin recommended that the Complainant speak with the loss prevention department, and the

Complainant did. TR at 32. On April 4, 1990 the new procedure was abandoned. The shifters reverted back to the previous method of personally checking the trailers before pulling away from the dock. Id. The shifters were required to sign a waiver stating that they would visually check the trailers before they pulled away.

On April 19, 1990 the Complainant was discharged for sexual harassment. TR at 33. The charges were filed by Brenda Kay Kennedy (Kennedy). The Complainant alleged that she was the designer of the unsafe procedure involving the shifters. He conceded that he made an inappropriate comment to her about her sexual preference. TR at 34. He also made a comment about her girlfriend working at the Sunday School. He denied saying anything about writing letters to her girlfriend's school to get her fired. TR at 89. When asked if he made the statement on the radio, he answered, "as I recall, I don't remember saying it on the radio." TR at 90-91. He stated that he made the statements because Kennedy was harassing him about getting out of his yardbird to get a drink of water and go to the bathroom. TR at 92.

The Complainant testified that he knew of other employees who had made inappropriate comments to management and supervisors, but knew of no one that was discharged or received a warning letter for making such comments. TR at 92.

Upon being discharged, the Complainant notified TOSHA and spoke with Robert B. Cooper (Cooper) about his discharge. The Complainant asserted that he was discharged in retaliation for his filing the TOSHA complaint. TR at 38. He testified that he does not recall telling Peter Cheng (Cheng), the Teamsters business agent, about his complaints to TOSHA or his assertion that the discharge was in retaliation for the complaints. TR 99-100. The Complainant filed a grievance with the Teamsters Union. They held a panel, but the Complainant was not present as he could not afford to attend. He was reinstated on April 19, 1990. TR at 38.

The Complainant testified that beginning in 1989, after he complained about the dangers inherent in the new switching procedure, his supervisor, Mike Terrell (Terrell), followed him "pretty much everyday that I worked." TR at 60. He testified, "eighty percent of the time, every switch that I made, [Terrell] was right behind me. Every switch I made." TR at 62. He explained that Terrell's job was to observe all the switchers and ensure that everyone was working properly. Id.

On August 27, 1990, the Complainant was discharged again. TR at 39. This incident involved Terrell. Terrell was doing an on the job survey and sat on a stadium seat on the hood of the Complainant's yardbird. The Complainant testified that he asked Terrell not to sit on the hood because it would not be safe. Id.

The Complainant claimed Terrell slid off the truck because the ride was not smooth. The Complainant was discharged for reckless endangerment.

After his discharge, the Complainant filed a grievance with the Teamsters. A hearing was conducted in Daytona Beach, Florida. TR at 63. At the panel, the Complainant did not tell that he filed complaints with TOSHA. TR at 106, 116. He testified that Cheng advised him not to tell the Panel about his complaints. TR at 106. As a result of the panel's decision, he was reinstated on September 18, 1990 and received back pay. TR at 40.

On March 18, 1991, the Complainant was discharged a final time. TR at 41. He was discharged for an act of dishonesty, more specifically, being paid for time while he took an unauthorized break. TR at 175. He argued that the National Master United Parcel Service Agreement for August 1, 1990 through July 31, 1993, page 102, Section 3 titled "Part Time - Relief Periods," provided for a ten minute break for part-time employees. He testified that the Agreement provided for a break between the first and third hour. He stated that he had been an air driver for one and one half years and did not know that he was not permitted to take a break while on his run. TR at 126.

The Complainant testified that he began the day's shift on March 15, 1991 at 8:00 in the morning, running next day air packages. TR at 43. At 8:35 he made his first stop at the Tennessee Teacher's Credit Union at 1400 Eighth Avenue, South. TR 46. The business did not open until 9:00. The Complainant put a UPS notice on the door to show that he attempted to make the delivery. Id. He testified that he then delivered the other packages. TR at 45. He explained that the fifteen minutes between his second to last stop and his last stop were a result of his having to collect and count \$2,520.00 in cash collected for a delivery. TR at 46-47. His last stop, at 10:30, was the Tennessee Teacher's Credit Union. TR at 45. After his last stop, he conceded that he went to the Pie Wagon Restaurant on Twelfth Avenue to take his break. TR at 50. He testified that he had worked two and one half hours and was therefore entitled to take a break before 11:00. Id.

The Complainant testified that while he was at the Pie Wagon, his supervisor at that time, Steve Burtnett (Burtnett) entered the restaurant. TR at 55. Burtnett asked him what he was doing. The Complainant answered that he was taking his ten minute break. Id. Burtnett told him he was not permitted to take a break on air time and that this was told to him at orientation. TR at 56. The Complainant testified that Burtnett knew he had not completed orientation. Id. The discussion grew heated before Burtnett finally left. The Complainant finished eating and then went back to work. He conceded being at the Pie Wagon for a total of fifteen

to twenty minutes. He argued that if Burtnett had not come in, he probably would have been there for only ten minutes. Id.

The Complainant left the restaurant at about 10:50 and drove back to UPS. TR at 57. After arriving at UPS, he completed his paperwork, ensured the truck had plenty of gas, and parked it in the line-up. Id. He then clocked out. The Complainant testified that he clocked back in at 1164, about 11:35, to work his second part time job in the warehouse. TR at 159. The time sheet submitted for March 15, 1991 is clock stamped February 12. TR at 157, CX 6. The Complainant explained that the time clock was stamping an incorrect date, but UPS was still using it because it was recording the correct times. TR at 158. He testified that he received the copies of the time card from Cheng. TR at 158.

The Complainant filed a grievance in regards to his March 18, 1991 discharge. A Panel was held in Daytona Beach, Florida. The Panel denied his grievance and did not reinstate him. He called Cooper and told him that his grievance had been denied. TR at 133. Cooper informed him that TOSHA would investigate. On May 16, 1991, he phoned Mr. Spurgon (Spurgon), legal counsel for TOSHA. TR at 133. Spurgon was aware of the Complainant's case and the decision of the Panel.

The Complainant received a letter dated August 7, 1991 from Commissioner White, Tennessee Department of Labor, stating that the Complainant's charges have been investigated and found to be without merit. TR at 136; JX 3. The case was closed and not subject to further review. The Complainant then spoke with Gill who advised him to send a letter to OSHA within thirty days of receiving Commissioner White's letter and ask them to investigate. TR at 137. He spoke with Gill in Atlanta on August 23, 1991 and received no response. This prompted him to write a letter dated August 30, 1991 to the United States Department of Labor, OSHA, in Atlanta. TR at 64-65. The Complainant sent a letter dated August 30, 1991 to OSHA requesting them to investigate his discharge.

The Complainant filed an 11(c) complaint with TOSHA on September 20, 1990. TR at 143. He did not file a concurrent complaint with OSHA because "TOSHA did not tell me that I had to file it at the federal level, too." TR at 145. An entry on page 10 of his notes states that on August 23, 1991, Fred Deeley of OSHA advised him that he had to file an 11(c) complaint with OSHA within fifteen days of filing one with TOSHA. TR at 141; EX 29.

He did not file with the National Labor Relations Board against the Teamsters Local 480 for not fairly representing him. TR at 119. He did, however, write to Ron Kerry of the Teamsters in Washington, D.C. TR at 119.

The Complainant testified that after the three most recent discharges, he notified TOSHA within three to four days. TR at 63.

He told them that each discharge was in retaliation for his safety complaints.

### **Testimony of James Allen Fryer**

Mr. James Allen Fryer (Fryer) testified on September 21, 1994 in Nashville, Tennessee. He has worked with UPS for about fifteen years. In March of 1991, Fryer worked in the same position as the Complainant, delivering 10:30 air packages. TR at 185. He had been delivering air packages for about six months when the Pie Wagon episode occurred. TR at 191. He stated that if an air driver started work at 8:00, 8:35 would be early for a downtown stop because in the morning, before leaving the center, the drivers had to sort the packages by order of their stop. TR at 196. He testified that he would take a break after all the packages were delivered. He would stop and call in to see if there was something else that was misloaded or something needed to be picked up. TR at 188. When he stopped to make the phone call he would usually get a drink. At the time the Complainant was fired, 10:30 air package delivery was new. "No one ever said do not take a break or do take a break." TR at 189. After the Complainant was discharged, however, managers and supervisors gave instructions about not taking breaks. TR at 189. Those instructions had not been given at any time earlier.

### **Testimony of Michael Louis Bochette, Sr.**

Mr. Michael Louis Bochette, Sr. (Bochette) testified on September 21, and 22, 1994 in Nashville, Tennessee. He has been working for UPS for fourteen years. TR at 198. He has been a union steward since his second year at UPS. TR at 199.

Bochette knew that the Complainant complained about the new switching procedure. TR at 199. He overheard the Complainant telling other managers about the dangers involved. TR at 200. Bochette was in attendance at a meeting between the Complainant and his supervisors where the Complainant said, "well am I going to have to go to OSHA in order to get this solved." TR at 201. Bochette tried to resolve the problem by speaking with his managers and supervisors. TR at 199. The new procedure was utilized for approximately nine to twelve months, before management returned to the original procedure. TR at 449.

Bochette tells of the time he was accused of taking an excessive break. He testified that he would clock in at 8:00 pm and would go into the break room with the six or seven other part time shifters. TR at 204. The yard controller knew the shifters were in the break room and would call to them if she needed them. Bochette said this was routine practice. TR at 204. While Bochette was in the break room one night, Randy Dunn (Dunn), hub manager of that shift, entered. Bochette, as job steward, had to discuss some grievances with Dunn. Dunn said the break room was

not the place for such a discussion. Bochette responded that instead of trying to resolve the problems, he would simply file the grievances. TR at 204.

Dunn left and returned to the break room with Harrell, Bochette's supervisor. TR at 205. Bochette testified that Dunn told Harrell that he was stealing company time and had taken an excessive break. Bochette further testified that Dunn wanted to terminate him for this, but Bochette was not discharged and did not receive a warning letter. TR at 205. He was the only part timer in the break room that was reprimanded. TR at 206. Bochette stated that he knew of no one else that was disciplined for stealing time. TR at 219.

Bochette testified that after the Complainant filed the TOSHA complaint, management treated him differently. TR at 208. He had a discussion with Terrell about the TOSHA complaint, but does not recall specifically what was discussed. TR at 450. He also had a discussion about the TOSHA complaints at Hooters with Bob Mannery, the division manager of the feeder department, and Ron McClain, the labor relations manager. TR at 449. He also testified that he noticed Terrell observing the Complainant for more time than he spent watching anyone else. Bochette stated that Terrell said to him, "I'm out here to baby-sit Kenny Clifton." TR at 209.

Bochette testified that he saw Terrell on the hood of the Complainant's yardbird on August 21, 1990. TR at 451. He had never seen a manager ride on the hood of a yardbird before. TR at 451. Bochette also testified that he did not see the Complainant speed up and brake suddenly. TR at 452. He explained that the yardbird is a bad ride because the yard is uneven and the braking system is crude. TR at 452. He had spoken with Terrell about the incident. Terrell said it was ordered by Carlton. TR at 452. Terrell never complained to Bochette of being injured. TR at 455.

### **Testimony of Robert Bradford Cooper**

Mr. Robert Bradford Cooper (Cooper) testified on September 21, 1994 in Nashville Tennessee. He has worked for TOSHA for almost twenty years. TR at 222. He is chief of standards and procedures. TR at 223. His job entails handling all discrimination cases under Tennessee Code Annotated 50-3-409 which is the state equivalent to 11(c) under the Federal Act. TR at 223.

The Complainant first contacted TOSHA when he spoke with Hawkins, a compliance officer, and reported the safety violations. TR at 223. He also filed a written complaint that was undated, but was filed prior to February 1, 1990, the date of TOSHA's inspection of the UPS center at White's Creek. TR at 224. The inspection resulted in a citation dated March 1, 1990 for the violation of the General Duty Clause, which is the state equivalent to Section 5(a)(1) of the Federal Act, and a fine of three hundred dollars.

TR at 224. UPS sent a letter to TOSHA dated March 16, 1990 indicating that UPS rectified the violation for which they were cited. TR at 234; CX 7. The Complainant saw UPS' response and challenged it.

At the request of the Complainant, TOSHA conducted a discrimination investigation. When the Complainant was reinstated in April 1990, TOSHA took no further action. The Complainant then filed another complaint and the two complaints were consolidated. TR at 232. TOSHA conducted an investigation. Cooper concluded there was no violation under Section 50-3-409 of the Tennessee Code and recommended to Relus Fleming, General Counsel, that he dismiss the complaint. TR at 232. During the investigation, Bochette and Fryer were not interviewed. TR at 241-242. The only witnesses interviewed were those provided by UPS. UPS also provided documentation that the Complainant had received orientation. TR at 243. The training occurred, however, in 1978. TR at 244. The complaint was dismissed by the Commissioner in a letter dated August 7, 1991. JX 3. The Complainant then filed an 11(c) complaint with regard to his ultimate dismissal. TR at 233.

#### **Testimony of Steve Burtnett**

Mr. Steve Burtnett testified on September 22, 1994 in Nashville, Tennessee. Currently, Burtnett is a full time input supervisor in the twilight hub at the UPS center at White's Creek. TR at 255. In March 1991, he was an on-car supervisor at White's Creek. He was responsible for fourteen drivers, their deliveries and their dispatch. TR at 256. At that time, there were only two air drivers at White's Creek, the Complainant and Fryer. Before the drivers drove on their own, they completed a two day orientation in which Burtnett explained the safe work methods, how to drive safely, delivery methods, and that everything had to be delivered by 10:30 am. TR at 267. During the two day orientation, Burtnett also discussed the start schedule. TR at 268. He is not sure whether he discussed breaks during the Complainant's training, but when he was on the road with the Complainant, they did not take a break. TR at 272. As of March 1991, Burtnett had been supervising the Complainant and Fryer for four to five months. TR at 258. The drivers load their own vans and are responsible for arranging the sequence of the stops and filling out the delivery record.

On March 15, 1991 Burtnett was on an on the job survey drive with Tom Hill, another air driver. On their way to a delivery stop, they drove by the Pie Wagon restaurant at 10:15 and saw the UPS air van parked at the restaurant. When they reached their delivery stop, Burtnett phoned the center to inquire whether a van had broken down. TR at 276. There were no reports of a disabled van.

Burnnett testified that the two of them finished delivering at 10:30 am and passed the restaurant again. TR at 276-77. The van was still in the parking lot and had not moved since they last saw the van fifteen minutes earlier. He further testified that they drove to the van and checked it for packages. TR at 277. There were no packages. Burnett saw the Complainant sitting at a corner table in the restaurant.

Burnnett stated that he went into the restaurant and confronted the Complainant. He told the Complainant that he did not get a lunch or a break. TR at 277. The Complainant responded that he did and Burnett said he did not. Id. After their conversation, Burnett left, returned to the van, and drove to their next delivery stop. TR at 278. Burnett estimated that the Complainant was parked at the restaurant for twenty-five minutes.

Burnnett testified that he was present at the hearing regarding the grievance filed by the Complainant on April 30, 1991. Also present were the Complainant, Hill, Cheng, and another business agent. TR at 285. Burnett also testified that at the hearing the Complainant did not challenge the times that Burnett stated the Complainant was at the Pie Wagon. TR at 286. Burnett did not recall testifying that the Complainant had a three day class orientation, nor did he bring his delivery record or other documentation to establish that he had conducted two on the job survey rides with the Complainant. TR at 292.

Burnnett testified as to the proper procedure regarding the delivery sheet. The drivers should not write down the delivery address on the record before the delivery. TR at 294. Drivers are trained to write the address of the delivery on their walk back to their vehicle. TR at 295. If a delivery can not be made, the driver should write "NI 1." TR at 296.

Also, Burnett testified that if the time clock is broken, it is fixed immediately. TR at 299.

### **Testimony of Thomas Ben Hill**

Mr. Thomas Ben Hill testified on September 22, 1994 in Nashville, Tennessee. He began working for UPS in 1977. He has worked as a truck driver for UPS since July 1987. TR at 312.

On March 15, 1991, he was doing an on the job survey air drive with Burnett who was showing him a new route to cover while the regularly scheduled employee was out on medical leave. TR at 314. He testified that as an air driver, he is not allowed to take a break, but as a full timer, he is permitted to take a break after the third hour and before the fifth hour. TR at 316.

Hill has delivered air packages for three years. TR at 336. He also testified that most packages are pre-loaded according to

sequence numbers. TR at 333. The truck is supposed to be set-up stop by stop in the order the packages will be delivered. Id. After a delivery run, there are administrative tasks that must be accomplished before clocking out. The tasks include, among others, turning in checks and counting the money received on cash on delivery stops. The routine takes about twenty minutes, but the drivers are allotted twenty-four minutes. TR at 335.

Hill testified that he learned how to correctly complete a delivery sheet by being trained and retrained. TR at 338. He was trained in a package car for five days. Id. Also, a supervisor does an on the job survey ride about every quarter. He also testified that on the delivery sheet, a driver marks "NI 1" to indicate that he attempted to make a delivery but was unable to deliver. TR at 337. The driver should then re-sheet the delivery at the second attempt. Id.

Hill testified that he first saw the UPS air van in the Pie Wagon parking lot at 10:15. Hill also testified that he knew it was 10:15 because as an air driver, he constantly looks at his watch to ensure delivery before 10:30. At the time they saw the air van at the restaurant, they were on their way to their last air delivery. TR at 317. After making their last delivery, they drove by another location where Hill would have deliveries in the future. TR at 320. They passed by the restaurant again and noticed the van had not been moved. TR at 320. They then made two more deliveries, the last to Universal Tire where Steve called UPS. When they both returned to the van, it was 10:35. TR at 322. They drove by the restaurant again and noticed the van was still in the same spot. They parked their van and Burtnett checked the Complainant's van for packages. Burtnett then entered the restaurant and returned to the van approximately ten to fifteen minutes later. TR at 323. Hill testified that he did not know whose van it was until he saw the Complainant in the doorway at approximately 10:50 am. TR at 323. Hill also testified that when Burtnett returned to the truck he said "I can't believe he is doing what he is doing. It got loud. He knows he is not supposed to take a break." TR at 323.

After they left the restaurant, they met Robert Vaughn for lunch. Later that day, Hill spoke with a union steward who advised him to make a written statement. TR at 324. He did so. Id.

### **Testimony of Brenda Kay Kennedy**

Ms. Brenda Kay Kennedy testified on September 22, 1994 in Nashville, Tennessee. She began working for UPS in 1975 as a package car driver. TR at 343. She worked for four years in the industrial engineering department. In 1989, she was a feeder engineer involved with the procedures, practices, and policies used in pulling the trailers away from the docks. Currently, she is an

on-car supervisor responsible for the delivery drivers and air package drivers. TR at 342.

Kennedy had a conversation with the Complainant about the switching procedure in which the shifter would not visually check the trailer. TR at 349. Before the new procedure was effectuated, the shifter had the responsibility to ensure that no one was in the trailer and the door was down. It was the hub manager's responsibility to actually close the door. TR at 355. Kennedy had recommended that the shifter should remain in the yardbird and wait until he was told by radio to pull away from the dock. Id. The Complainant did not complain directly to her about the new procedure. TR at 351.

The Complainant, while in the hub at White's Creek, got on the radio and asked Kennedy whether her lesbian girlfriend was still working for the Baptist Sunday School Board and wondered what would happen if the Baptist Sunday School Board knew that there was a lesbian writing children's books. TR at 352. Then, also over the radio, the Complainant asked Ronnie Giles (Giles) if he heard what the Complainant said. Giles asked him to repeat it and the Complainant did. Id. Kennedy was standing next to the Complainant when this incident occurred. Id. Kennedy testified that she said nothing to the Complainant but after her shift, she spoke with her supervisor and manager. TR at 353. She also reported it to the feeder department and her boss at the engineering department. She requested action to be taken against the Complainant. TR at 353. The Complainant was discharged, but no action was taken against Giles even though he asked the Complainant to repeat the statement. TR at 366.

At the time of the above incident, Kennedy had no knowledge about the TOSHA investigation. She also did not know that the Complainant had filed a complaint with TOSHA. TR at 354. She testified that she first learned of the Complainant's filing a complaint during the week of the September 21-22, 1994 hearing. TR at 360. Although she was responsible for the safe operation of the switching procedure at the time of the TOSHA inspection, she denied ever being told about the inspection or the resulting citation. TR at 361. Kennedy denies ever seeing the citation, and being provided with the recommendations of TOSHA, or being informed of how to comply. TR at 361. She also denies that management told her to pay special attention to the Complainant. TR at 361.

Kennedy recalls that the Complainant said to her, "I guess you're pretty upset since I got all of them in a war." TR at 362. Kennedy did not inquire into what he meant. TR at 363.

#### **Testimony of Michael Terrell**

Mr. Michael Terrell testified on September 22, 1994 in Nashville, Tennessee. Has worked for UPS for twenty-one years. TR

at 370. In August 1990, he worked as an on-yard supervisor in the feeder department at White's Creek.

It was common practice at UPS to conduct on the job surveys on a quarterly basis. TR at 377. If there was no seat in the yardbird for the supervisor, it was common practice for the supervisor to sit on the hood of the yardbird and hold on to the several rails on the hood. Id.

Terrell testified that on August 21, 1990, he conducted an on the job survey with the Complainant. TR at 377. He denied conducting the survey because the Complainant had filed complaints. TR at 380. Rather, he argued, it was a standard quarterly survey as required. Id. At the time of the survey, Terrell knew that the Complainant had filed a complaint regarding a safety-related item with TOSHA, but did not know the specifics. TR at 388. He does not recall seeing anything posted from TOSHA regarding its citation. TR at 389.

To conduct the survey, Terrell sat on a stadium type seat that he placed on the hood of the Complainant's yardbird. TR at 377. He had never used the stadium type seat before. TR at 382. Terrell also testified that as they were driving across the yard at a pretty good speed, the Complainant slammed the brakes. TR at 377. Terrell testified that he had to hold on in order that he would not be thrown. Id. He stated that the Complainant slammed on his brakes four times. Id.

Terrell conceded that he thought sitting on the hood of the yardbird was not safe, but he never complained to management about it. TR at 383. He further testified that he was injured from the Complainant's behavior. TR at 379. His shoulder popped and he suffered soreness and stiffness for "some time." Id. After the ride he told Carlton, his manager, what just occurred. TR at 378.

#### **Testimony of Charles D. Coleman**

Mr. Charles D. Coleman (Coleman) testified on September 22, 1994 in Nashville, Tennessee. He has worked for UPS for twenty-eight years. TR at 393. He has been the labor relations manager since 1989. TR at 394. His responsibilities include presenting all cases on behalf of UPS to the panel. TR at 400.

Coleman explained the permitted break periods. TR at 428-32. Under Article 40 of the Agreement, air operation employees who are covered by a daily guarantee are allotted the same rest periods as outlined for part-time employees on page 102. TR at 428. That section reads, "Part-time employees will be guaranteed ten minutes relief period during each work shift. The relief period may not start before the end of the first hour and must be completed by the end of the third hour. EX 28 at 102. Air operation employees that are covered by a daily guarantee are those employees who have as

their sole job air operations. TR at 429. There is nothing in the Agreement, however, that states air operations must be their sole job. TR at 429. Coleman further explained that if an employee is doing an air job in addition to another job, he gets paid for the actual hours he worked and is permitted to take his ten minute break on his principal, non-air job. TR at 431.

He conceded that if the Complainant had taken only a ten minute break, these proceedings would not have been brought. TR at 433. At the local hearing, the Complainant's grievance was denied based on the testimony of Hill and Burtnett, the Complainant's delivery sheet, the fact that White's Creek is 9.7 miles, a twelve to fourteen minute ride, from the Pie Wagon restaurant. TR at 417-18. When asked if the Complainant had ever filled out a delivery sheet correctly, Coleman responded, "evidently he did or somebody would have corrected him since he'd been doing it for two years." TR at 447. The Complainant made no reference at the hearing about his filing a TOSHA complaint. Id.

At the panel in Daytona Beach, Florida, Coleman recalls the Complainant testifying, "the company is only terminating me because I filed OSHA complaints." TR at 422. The Panel also upheld the discharge. TR at 425. Once the Panel renders its decision, an employee has no further recourse under the Agreement. TR at 425.

The Complainant's attorney asked Coleman about Fryer not being able to testify. TR at 435. Coleman responded that Fryer was in Florida on vacation and would have been allowed to testify if he wanted. Id.

Coleman opined that the Complainant was at the restaurant for longer than he admits, considering that it takes between twelve and fourteen minutes to travel by car at 10:30-11:00 in the morning from the restaurant to White's Creek. TR at 419. He explained that stealing time means taking excessive break time. TR at 419. It is taking a break when you are not permitted to do so and not properly documenting it. Id. It is also being paid for time not worked. Id.

In regards to the Terrell incident in August 1990, Coleman testified that he had never heard of a manager riding on the hood of the yardbird. TR at 441.

CONCLUSIONS OF LAW

Issue 1. Whether the Complainant filed a timely complaint with the United States Department of Labor.

The regulations at 29 C.F.R. §1978.102 provide as follows:

(b) Nature of filing. No particular form of complaint is required.

(c) Place of filing. The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but filing with any OSHA officer or employee is sufficient. Addresses and telephone numbers for these officials are set forth in local directories.

(d) Time for filing. (1) Section 405(c)(1) provides that an employee who believes that he has been discriminated against in violation of Section 405(a) or (b) " \* \* \* may, within one hundred and eighty days after such alleged violation occurs, file or have filed by any person on the employee's behalf a complaint with the secretary.

The charge made by a complainant in these proceedings is not to be considered a formal pleading setting forth legal causes of action which may serve to limit the suit. Richter v. Baldwin Associates, 84-ERA-9 (Secy March 12, 1986). The purpose of the complaint is merely to initiate an investigation by OSHA. Spearman v. Roadway Express, Inc., 92-STA-1 (Secy August 5, 1992). The regulations and the ensuing case law makes clear that there is no particular form of complaint required.

The Complainant was discharged for a final time on March 18, 1991. The Complainant testified that after TOSHA dismissed his complaints he wrote to OSHA in a letter dated August 30, 1991, requesting them to further investigate. Also in the record is the Complainant's letter. CX 4. The record makes clear that he filed a complaint with the OSHA office in Atlanta within one hundred and eighty days of his discharge. Accordingly, I find that the Complainant filed a timely complaint with the U.S. Department of Labor.

Issue 2. Whether the Complainant is a protected person under Section 405.

The regulations define an employee as (1) a driver of a commercial motor vehicle; (2) a mechanic; (3) a freight handler;

or (4) any individual other than an employer who is employed by a commercial motor carrier and who in the course of his employment directly affects commercial motor vehicle safety. 29 C.F.R. §1978.101(d).

The Complainant, although also responsible for making local deliveries, was responsible for interstate deliveries to Alabama and Kentucky. He also performed duties as a freight handler, loading the next-day air vans for the day's deliveries. Furthermore, the Complainant is an individual employed by a commercial motor carrier who affects commercial motor vehicle safety. See 409 U.S.C. §10102.

Accordingly, I find that the Complainant is a protected person under the Act.

The Complainant bears the initial burden of establishing a prima facie case of retaliatory discharge. The prima facie case raises an inference that protected activity was the likely reason for the adverse action. Once successful, the burden of production shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for its employment decision. If the Respondent rebuts the inference of retaliation, the Complainant then bears the ultimate burden of demonstrating by a preponderance of the evidence that the legitimate reasons were a pretext for discrimination. Moon v. Transport Driver, Inc., 836 F.2d 226 (6th Cir. 1987).

To establish a prima facie case of retaliatory discharge, the Complainant must prove that he engaged in protected activity, that he was the subject of adverse employment action, that his employer was aware of his protected activity, and that there was a casual link between his protected activity and the adverse action of his employer. Moon at 226.

Section 2305 provides:

(a) No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment because such employee has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or had testified or is about to testify in any such proceeding.

(b) No person shall discharge, discipline or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of

any federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstance then confronting the employee, would conclude that there is a bona fide danger of an accident, injury or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain correction of the unsafe condition.

The evidence produced by the Respondent to rebut the presumption of discrimination only has to raise a genuine issue of fact as to whether discrimination actually occurred. It does not, at this stage, have to prove that it was actually motivated to fire the Complainant because of the proffered reason. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 454-55 (1981). The Complainant must then prove that the Respondent's explanation for terminating his employment is not the "true reason."

### Issue 3. Whether the Complainant engaged in protected activity.

To establish his prima facie case, the Complainant must prove that he has engaged in protected activity. Under subsection (a) of Section 2305, protected activity may be the result of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal activities, such as internal complaints to management. Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159 (9th Cir. 1984); Davis v. H.R. Hill, Inc., 86-STA-18.

The Complainant testified that when the switching procedure was changed, he noticed the potential for danger and discussed this first with Shadelow, his warehouse supervisor. When he received no response, he discussed the issue with Harrell. After speaking with four managers and receiving no satisfactory response, he spoke with Hawkins at TOSHA and reported the violations. He also filed an 11(c) complaint with TOSHA on September 20, 1993. Additionally, the Complainant phoned Liberty Mutual and reported the unsafe switching procedure. He contacted TOSHA again, after his April 24, 1990 discharge and again after his March 18, 1991. discharge.

The Complainant's testimony as to this issue is supported by other evidence in the record. First, the testimony of Cooper bolsters the Complainant's assertion that he participated in protected activity. Cooper testified that the Complainant filed a complaint over the phone with Hawkins some time prior to February 1, 1990. Also, Hawkins inspected the UPS center at White's Creek

and issued a citation for safety violations. Additionally, TOSHA conducted a discrimination investigation after the Complainant's April 24, 1990 and August 27, 1990 discharges.

Second, the testimony of Bochette supports the Complainant's testimony that he participated in protected activity. Bochette testified that he knew that the Complainant had complained about the new switching procedure. He had overheard the Complainant telling other managers about the dangers involved in the new procedure. Also, he was present at a meeting when the Complainant suggested he would contact OSHA to get the problem resolved. Bochette had conversations with other managers about the TOSHA complaints.

I find the record replete with evidence establishing that the Complainant participated in protected activity. No one denies that the Complainant filed TOSHA complaints. The most convincing evidence is the TOSHA citation dated March 1, 1990.

Issue 4. Whether the Complainant was subject to adverse action by the Respondent.

The Complainant must establish that the Respondent took some adverse action against him. In the record, it is not disputed that the Respondent discharged the Complainant. He was discharged on March 18, 1991. Clearly, the Complainant was the subject of adverse employment action.

Issue 5. Whether the Respondent was aware of the Complainant's protected activity.

The third element that the Complainant must establish in order to make his prima facie case is whether the Respondent was aware of the Complainant's protected activity.

The Complainant testified that he reported the potential dangers first to his immediate supervisor, Harrell. In the period that followed, he reported the dangers to numerous other supervisors and union stewards and told them that he would report the violations to OSHA if the problem was not rectified.

Bochette testified that the Complainant told him about the potential danger. Also, Bochette testified that he was present at a meeting where the Complainant told supervisors that he would follow through with his complaints and contact OSHA.

Additionally, Terrell testified that he was aware of the complaints to TOSHA. Furthermore, Coleman testified that the Complainant stated at his March 1991 hearing that he was being terminated because he had filed complaints with OSHA.

Kennedy testified at the hearing that she was not aware of the TOSHA investigation or the TOSHA citation. She also denied being shown the TOSHA recommendations on how to comply with the safety regulations. Although I find Kennedy credible on other issues, I do not find her credible in this matter. I find it incredible that Kennedy, the hub engineer who is responsible for the safe operation of the switching procedure, was not informed of the safety violations involving the switching procedure or the TOSHA recommendations.

Based on the foregoing, I find that the Respondent was aware of the Complainant's complaints with TOSHA.

Issue 6. Whether there is a casual link between the Complainant's protected activity and the adverse action of the Respondent.

In order to establish his prima facie case, the Complainant must prove a causal link between his protected activity and the adverse action of his employer. The Complainant alleges that his employer terminated him because of his complaints to TOSHA. The Respondent alleges that they discharged the Complainant for an act of dishonesty, "stealing time."

The Complainant testified and conceded to being at the Pie Wagon restaurant for over ten minutes. He testified that he was in the restaurant for fifteen to twenty minutes and that he left at 10:50. He also testified that if Burtnett did not enter the restaurant, he probably would have only been there for ten minutes. Additionally, he submitted a time sheet allegedly representing the hours that he worked on March 15, 1991. CX 6.

Burtnett testified that he saw the Complainant's van parked in the restaurant parking lot for twenty-five minutes. He testified also that if the time clock is broken, it is fixed immediately, as so many employees rely on it.

Hill testified that he first saw the Complainant's van parked in the restaurant parking lot at 10:15. He testified also that it was not until 10:50 when he and Burtnett left the parking lot. At that time, the Complainant remained inside the restaurant.

I find the Complainant's testimony not credible. His past behavior exemplifies his weakness of character. In his years at UPS, he received numerous warnings and suspensions, even years before the switching procedure was changed. He had a consistent record of discharges before his last discharge on March 18, 1991. Despite the warnings and the progressive discipline which had been imposed upon him before his report to TOSHA and OSHA, his performance deteriorated. Although the exhibits submitted by the Respondent show otherwise, the Complainant testified that he was discharged in 1981, rehired, and did not receive any warning

notices, suspensions, or discharges until 1990. His behavior towards his supervisor, Kennedy was egregious. The fact that he used Kennedy's sexual orientation for his own benefit is so flagrant that it brings his own character into question.

Additionally, I find that the Complainant intentionally falsified his delivery sheet. He testified that his first stop was at the Tennessee Teachers' Credit Union where he was unable to deliver. Yet, he did not properly indicate this on his delivery sheet by writing "NI 1." As Coleman pointed out, the Complainant must have known the correct way to fill out the delivery sheets, because he had been using them for two years. I believe that had he completed the delivery sheets incorrectly in the past, he would have received a warning notice. As there is no warning notice indicating such, I believe the Complainant knew how to correctly complete the delivery sheet.

Furthermore, I do not find his explanation credible as to why the time clock stamped "Feb 12" on his March 15 time sheet. I do not believe that a company such as UPS, which runs "the tightest ship in the shipping business," would use a time clock that was not functioning properly. I find Burtnett's testimony more credible in that if the time clock was malfunctioning, it would have been repaired immediately. Therefore, there is no credible evidence establishing what time the Complainant returned to White's Creek. As I find Burtnett's and Hill's testimony credible<sup>2</sup>, there is evidence establishing that the Complainant was at the restaurant until at least 10:50, thirty-five minutes after his van was first spotted in the parking lot.

Based on the foregoing, I find that the Complainant took at least a thirty-five minute break while still on the clock. Had the Complainant been entitled to a ten minute break, he would still be guilty of "stealing time," as UPS terms it. He conceded to being at the restaurant between fifteen and twenty minutes. Accordingly, the Complainant failed to establish a causal link between his complaints to TOSHA and the Respondent's discharging him. The Respondent submitted clear and convincing evidence that the Complainant was guilty of an act of dishonesty, a dischargeable offense. The Complainant failed to establish that the March 18, 1991 discharge was for any reason other than his own dishonesty.

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<sup>2</sup> I do find some discrepancies in their testimony. For example, Burtnett testified that the air drivers are responsible for loading their own vans and arranging the packages in order of their stops. TR at 258. Hill testified that the packages are pre-loaded according to the order of delivery. TR at 333. I recognize that their testimonies do differ in some areas, but are substantially the same in regards to the time they saw the Complainant's van parked in the restaurant lot and their stops on that day. Therefore, I find that their testimony is credible.

**RECOMMENDED ORDER**

IT IS RECOMMENDED that the complaint of Kenneth C. Clifton against United Parcel Service be dismissed.

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**PAUL H. TEITLER**  
ADMINISTRATIVE LAW JUDGE

Camden, NJ  
PHT:MDS

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).